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No. 69278-0-I
COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

SHUMET MEKONEN, WONDWOSSEN MERSHA; TIGABU LAKEW; HABTAMU ABOYE; YIRGA BELETE; and SELAMNEH AMBAW,

APPELLANTS

v.

DESSIE ZEWDU; WORKU ASMARE; WORKU MELESE; BAZAZEW BIRHAN; MOTBAYNER TEBEJE; ENDALE ANDENO; MELAKU KEBEDE; NEGA WONDIMAGEGN; KASA DERAR; and GREEN CAB TAXI & DISABLED SERVICE ASSOCIATION, LLC,

RESPONDENTS / CROSS-APPELLANTS

REPLY BRIEF OF RESPONDENTS IN SUPPORT OF CROSS-APPEAL

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I. INTRODUCTION

The pecuniary harm suffered by a business is lost profits. The pecuniary losses suffered by employees are lost wages. The evidence is unanimous that the cab drivers in this case were not employees. 7/23 VRP 94-95 (Mekonen testimony); 7/30 VRP 143/12-14 & 144/12-14 (Worku Asmare testimony). Rather, they were in business for themselves. They either lost expected profits, or they lost nothing. The trial court abused its discretion by allowing claims based on evidence of lost gross revenue, which were not supported by the best documentary evidence, to go to the jury. This undermines the damages awards both for breach of contract, and for tortious interference.

Mr. Mekonen testified at his deposition that he did not have a personal claim for damages. The trial court clearly ruled in limine that, while Mr. Mekonen could testify to the lost profits of his group, he could not assert or recover on a personal claim for damages. Nonetheless, the trial court subsequently admitted evidence of a personal claim over objection, and Mr. Mekonen recovered on a personal claim for damages that was never disclosed in discovery. This returns litigation to a game of "blind man's bluff", and was an abuse of discretion.

The RFP contract was between King County and Green Cab LLC. It was not a personal contract available to individual members to sue on.

The fiction of an oral agreement to carry out its terms is nowhere supported by the record, and it proves too much – it is a way to bootstrap every corporate obligation into an obligation between the individual members, thus eviscerating both limited liability and the statutes and rules on derivative actions in a single stroke. Furthermore, there can be no consideration for such an agreement, because the individual members of an LLC cannot alter their share of the benefits or burdens under an entity contract by an oral agreement between themselves as individuals.

II. REPLY ARUMENT IN SUPPORT OF CROSS-APPEAL

A. The Trial Court Abused its Discretion by Admitting Unverified and Unverifiable Evidence of Gross Revenue

Plaintiffs' Group argues that the standard of review for the lost profits issue is substantial evidence, as if Defendants were asserting a challenge to the sufficiency of the evidence to support a jury verdict. *Appellants' Reply and Response Brief* at 19 (hereinafter "Appellants' Response"). But that's not the issue. The issue is whether the trial court erred in permitting certain claims to go to the jury on the basis of improper evidence of damages. Defendants moved in limine based on failure to provide documentary evidence of damages and failure to prove lost profit damages with reasonable certainty and best evidence, CP 731-32, 734, 737-38, 739-41; 7/18 VRP 25-26/21-4, 51/12-18, and moved for directed

verdict on damages on all claims due to failure to provide any documentary supporting evidence, and the presentation of gross revenue figures as damage claims. 7/26 VRP 62-63/8-5. The motion in limine argued the lost profits issue in detail, stating both that such damages must be proven with reasonable certainty, and that the best documentary evidence of lost profits is required.[1] CP 737-38, 739-41. The motion in limine was denied in part by the trial court (and, to the extent granted, not subsequently enforced), 7/18 VRP 50/20-25, 7/19 VRP 45-46, 68-73, 7/24 VRP 43/16-21, and the motion for directed verdict was denied by the trial court. 7/26 VRP 63/6-8. The trial court ruled that any deficiencies in discovery disclosures or proof of damages could be addressed by cross-examination. 7/18 VRP 50-51/9-23. This is error. First, discovery compliance is the precondition that makes cross-examination possible. Without disclosure of the documents underlying the numbers, there was no factual basis for cross-examination. Second, the totally undocumented and unverifiable evidence of lost profits in the form of alleged loss of gross receipts never reached the threshold of admissibility, and its admission only confused the jury into relying upon flawed information. *Farm Crop Energy, Inc. v. Old National Bank of Washington,* 109 Wn.2d

[1] This motion placed the lost profits issue before the trial court, and therefore before this Court on appeal. The fact that a lost profits jury instruction was not given is immaterial to the propriety of allowing this evidence to go before the jury.

923, 930-31, 750 P.2d 231 (1988) (pro forma estimates not admissible); *B&B Farms, Inc. v. Matlock's Fruit Farms, Inc.*, 73 Wn.2d 146, 151, 437 P.2d 178 (1968) (best evidence of business losses must be presented to recover damages for lost profits); *National School Studios, Inc. v. Superior School Photo Service, Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952) (oral estimates by owner unverified by any written documentation does not constitute reasonable certainty of proof of lost profits); *Parkway Dental Assocs., P.A. v. Ho & Huang Properties, L.P.*, 391 S.W.3d 596, 608 (Tex. App. 2012) (gross revenues not admissible to prove lost net profits).

1. Standard of Review

The standard of review on grant or denial of a motion in limine is abuse of discretion. *Clark v. Gunter,* 112 Wn. App. 805, 808, 51 P.3d 135 (2002).

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *accord, e.g., Ryan v. State,* 112 Wn. App. 896, 899-900, 51 P.3d 175 (Div. 1 2002). In this case, given the applicable legal standard that lost profits

must be proven with reasonable certainty and the best evidence of actual documentary verification, rather than by plucking pro forma numbers out of the air, it was outside the range of acceptable choices for the trial court to permit the lost profits claim to go to the jury.

The standard of review of denial of a motion for directed verdict is whether "there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party." *Brown v. Dahl,* 41 Wn. App. 565, 573, 705 P.2d 781 (Div. 2 1985). Because the evidence of lost revenues without documentary verification was clearly inadmissible as a matter of law, there was no evidence to support a verdict for the plaintiffs on damages.

2. Plaintiffs' Damages Evidence was Inadmissible and Insufficient to Raise a Jury Question

a. The "New Business Rule" Applies

All the evidence on the challenged verdicts is based on alleged loss profits of a new business from the schism between competing management groups to the date of trial. Mr. Mekonen testified that he opened the Plaintiffs' Group's new office in Seattle in January 2011, that he and his group were "prevented" from working the Bellevue hotel cab stand beginning January 2011 when he opened that competing office, and that his damages were calculated for the period from January 2011 to the

date of trial. 7/24 VRP 16/13-24, 27-28/22-6, 28/15-18, 43-44/25-12. Clearly, that competing office at a separate location was a new business, and his claim is for lost work in the new business. Green Cab as originally constituted was required to be a single entity under one management operating from a single location, and withdrawal of members was forbidden. *Ex. 1* ¶5.6(a); 7/31 VRP 109/22-25. Nonetheless, Plaintiffs admitted that they withdrew from Green Cab. *Ex.* 50; 7/19 VRP 45/6-11; 7/31 VRP 109-10/22-2. Thus, the damages sought were for losses suffered by Mr. Mekonen in his new business venture after he withdrew from Green Cab.

Likewise, both Mr. Mersha and Mr. Belete testified to losses claimed from the date of the split between the two groups to the date of trial, which is the period of their new business. 7/25 VRP 109-10/1-4 (Mr. Mersha claimed losses for two years beginning with lawsuit in October 2010); 7/26 VRP 30/3-13 (Mr. Belete claims for about 1½ years back to January 2011). They were awarded damages for tortious interference, not breach of contract. CP 349. Under the evidence this could refer to interference with the office, the dispatch system, and/or their use of the Bellevue hotel stand, but all of this is dated to the period of their new

business venture as "Plaintiffs' Group Cab Company," after the time that they admitted they had withdrawn from Green Cab.[2]

Contrary to Plaintiffs' argument, *Appellants' Response* at 24, the fact that the new business and the old business were both driving a cab does not make the new business any less new or less speculative. Thus, in *Larsen v. Walton Plywood Co.,* 65 Wn.2d 1, 390 P.2d 677 (1964), the new business rule was applied to parties who had been involved in the manufacture of plywood for over thirty years, when they sold the plant and went into business as exclusive selling agents of plywood products for the company they had just sold. *Id.* at 3-4, 16-17. If Mr. Mekonen had been driving for a well-established company like Yellow Cab for thirty years, and then went out to form Mekonen's Taxi Service, the latter would be a new speculative venture because he would have to staff it, get licenses, and attract customers by becoming known for service, just as any other new business must do. Green Cab was a bit more established than the Plaintiffs' Group's new company (though obviously still struggling), but as Mr. Mekonen testified, the new company he formed had to hire its

[2] If this were not the case, then all of Plaintiffs' judgments for interference with contract would have to be reversed, based on the rule that a party cannot be liable for interfering with his/her own contract. *Deep Water Brewing, LLC v. Fairway Resources, Ltd.,* 152 Wn. App. 229, 265, 215 P.3d 990 (Div. 3 2009).

own manager, equip an office, try to get licenses, and start over again. 7/24 VRP at 23-24.

b. Even Established Businesses Must Prove Lost Profits with Reasonable Certainty and the Best Documentary Evidence, and Plaintiffs Have Failed to Carry that Burden

Contrary to Plaintiffs' arguments, the newness of the business is not the final determinant here. While it is true that a claim to lost profits for a new business is especially suspect, even losses based on established businesses must be shown with reasonable certainty, and the best evidence. *National School Studios v. Superior School Photo Service, supra,* 40 Wn.2d at 275 (rule requiring reasonable certainty and best evidence of damages is applied to well-established existing business claiming losses). Indeed, the best evidence portion of the rule – which requires a showing of actual profit and loss statements, or other standard accounting documents – could only be applied to an existing business with some degree of operating experience.

With respect to the challenged verdicts for breach of contract and tortious interference, the evidence of lost profits based on undocumented, unverified, and pro forma gross receipts oral testimony, simply fails to reach the threshold of "reasonable certainty," and therefore it was inadmissible.

c. Arguments about Other Damages for Loss of Vehicles or Value of Licenses are Irrelevant on this Record

The only award that was not based on alleged lost profits was the award to Wondwossen Mersha on his claim for breach of fiduciary duty. Mersha's vehicle was repossessed by the bank, then purchased by Defendant Zewdu for $11,000, and re-sold to Defendant Melese for $25,000. 7/25 VRP 102/15-20, 103/3-7. Based on this, the jury awarded Mersha the difference – $14,000 – for breach of fiduciary duty against Zewdu and Melese. CP 349, 352-53. **Defendants do not challenge that award on appeal.** Plaintiffs' briefing at pp.21-22 and 27 is therefore a red herring, which should not distract this Court from the challenged awards based on faulty evidence of lost profits.

No one else was awarded breach of fiduciary duty damages. CP 349. Nor could the jury have awarded Mekonen or Belete damages for loss of vehicles on any theory. No such award could have been made to Belete, since he offered no testimony about loss of a vehicle or license. 7/26 VRP 27-37. No such award could have been made to Mekonen, since he did not state any value for loss of vehicles (it is not clear that he even did lose any vehicles), but instead testified to lost revenue per vehicle. 7/24 VRP 40-41/2-3; 62, 64, 66/4-21.

Nor could awards be based on loss of the value of the taxicab licenses. The individual drivers colloquially refer to the licenses as "their" licenses, but the evidence is that they are the property of King County, and they are granted to Green Cab (not individual drivers) merely for temporary use. As admitted by Mr. Mekonen:

Q: Mr. Mekonen, we talked about who owns these licenses. Isn't it true that actually King County owns the licenses?

A: Any license is owned by the county, any city or county plates owned by the county.

Q: Okay. So the county, King County, owns the licenses that were granted to Green Cab; is that correct?

A: Yes.

7/24 VRP 67/17-24. What's more, the Green Cab licenses, unlike past licenses, are non-transferable without County permission. 7/19 VRP 90-91/20-4, 91/17-21; 7/30 VRP 109-10/21-2.

d. Plaintiffs Failed to Produce the Best Evidence of Profits

Plaintiffs attempt to argue that, in the words of their subject-heading, "the best evidence of lost profits was provided." *Appellants' Response* at 24. This is simply not accurate.

First, Plaintiffs assert that by taking back the office, Defendants prevented Plaintiffs from producing their best evidence. *Id.* at 25. But since the damages periods ran during the time **after** the Defendants

reclaimed the office, when Plaintiffs went out into business for themselves in 2011 and 2012, this argument misses the mark. Plaintiffs claimed that they lost profits in 2011 and 2012, admitted they had trip sheets at their new office, should have had tax returns and other business records of their income and expenses, yet chose to rely purely on oral testimony of their losses. That is not the best evidence of lost profits.

This argument also fails on its face, even as to documentary information in the possession of Defendants, because all this information was accessible to Plaintiffs through discovery. Thus, in *Lindy Pen Co. v. Bic Corp.,* 982 F.2d 1400 (9th Cir. 1993), plaintiffs alleged damages but failed to come forward with evidence permitting the trial court to determine the amount of the loss with reasonable certainty, then claimed that producing such evidence was "impossible" due to the fact that the information was in Bic's records and not separated out for the particular sales in question. *Id.* at 1407-08. The District Court denied Lindy's damages claim for lack of proof, and the Ninth Circuit affirmed, finding that "Lindy had access through discovery to Bic's records from which a reasonable estimate could have been accomplished." *Id.* at 1408. Obviously, in this case too, Plaintiffs could have requested any documentary proof needed that was in the custody or control of Defendants, CR 34(a), and their failure to do so and to produce such

evidence is not excused by the claim that some of the records may have been in Defendants' possession.

Plaintiffs further argue that in fact Mr. Mekonen testified as to expenses as well as gross revenue, so Defendants' characterization of the evidence is alleged to be inaccurate. *Appellants Response* at 25. First, even if Mekonen's damages claims had solely been based on net profit figures, this would not cure the fundamental flaw that, in the absence of documentation, these numbers were not the best evidence and were not reasonably certain. Second, the fact that Mr. Mekonen testified to some expenses was not hidden by Defendants, but was expressly stated in our brief. *Brief of Respondents and Cross-Appellants* at 37 (hereinafter "Brief of Respondents"). However, despite these scattered references to expenses, Mr. Mekonen's direct testimony in support of his claim for damages was not based on net profits or any reference to expenses, but was submitted solely based on gross receipts numbers, which the trial court should not have permitted. 7/24 VRP 40-41/2-2, 43/3-13, 43-44/25-18, 44-45/19-4, 66/4-21.

Indeed, the Plaintiffs' own citation to testimony in support of this point only serves to highlight the error. After four days of Mr. Mekonen's testimony which included the pro forma "plan," 7/23 VRP 27/5-11, 27-

28/22-1, 28/11-24, 70/2-3, and his claim for damages based on gross receipts, a juror asked:

> Q: The revenue per day was estimated to be $300. After expenses for gas, et cetera, what would be the estimated profit per day of a taxi at the Bellevue location?
>
> A: We have hybrid cars. They cost about $85. And we take insurance daily is about less than $18. I'd say about $150, $160 is the average you can take.

7/25 VRP 69/9-14. Thus, at least one juror recognized what the trial court failed to recognize: that the relevant number was lost profits, not gross receipts. Yet the Defendants' Motion in Limine on this point was denied, and **all Plaintiffs** were allowed to submit their damages claims based on multiplication of the $300 / day gross revenue number. 7/24 VRP 40-41/2-2, 43/3-13, 43-44/25-18, 44-45/19-4, 66/4-21 (Mekonen); 7/25 VRP 106-07/23-3, 107/7-10, 107-08/22-7, 109/1-5, 109/11-17 (Mersha); 7/26 VRP 28-29/13-15 (Belete). That constituted an abuse of discretion in that it was outside the range of acceptable choices under the applicable legal standards. Therefore, the judgments on breach of contract and tortious interference must be reversed.

e. Plaintiffs are Not Entitled to Recover Gross Receipts

Without any citation to authority, Plaintiffs argue that "[w]here a party has incurred all costs anticipated in performance of a contract, but is deprived of the revenue, the proper measure of damages is not lost profits,

but lost revenue." *Appellants' Response* at 21. But Plaintiffs were not deprived of revenue for their work at Green Cab; their own testimony is that their revenue at Green Cab was $300 per day per vehicle. Their damages claims are for **losses in their new businesses, after they left Green Cab.** They are not entitled, under any conceivable theory, to reimbursement of expenses they may have paid out for the purposes of starting a new business after they left Green Cab. Certainly there is no contractual obligation on the part of Defendants to pay Plaintiffs' start-up costs. And because Plaintiffs admitted that they withdrew from Green Cab, they are not entitled to continue to earn the same gross receipts that they claim they were earning when they worked with Green Cab. All that Plaintiffs might conceivably be entitled to recover is lost profits in their new business, if they could in fact prove that they would have had any. But, as we have demonstrated, Plaintiffs failed to submit proper proof of lost profits, and therefore their breach of contract and tortious interference judgments must be reversed.

Even if Plaintiffs' proferred "gross receipts" formula was proper, which Defendants deny, any attempt to apply it to the facts of this case would lead to significant excess recovery over actual expenses. For example, Mr. Mersha's damages claim was based on the pro forma calculation of 24 months times 20 days a month of driving times $300

gross receipts per day, which equals $144,000. 7/25 VRP 109/1-5, 11-17. But Mr. Mersha also testified on cross-examination that, of the $300 per day he claimed in damages based on prior experience with Green Cab, only about $140 would have been profit back when he worked at Green Cab. 7/25 VRP 119/17-19. According to this cross-examination testimony, this means that $76,800 of Mr. Mersha's $144,000 claim would be expenses during the damages period. But he also testified that his **actual expenses** in his new taxi business were only $600 per month, which equals $14,400. 7/25 VRP 110/15-17. Under Plaintiffs' suggested formula, Mr. Mersha would thus get a windfall of all the additional gross receipts beyond his actual expenditures ($64,400). Because there is no evidence that Plaintiffs actually did expend the significant and regular monthly business expenditures that everyone spent together while working as part of Green Cab LLC, the record does not support application of a gross receipts damages formula to his case.

B. The Trial Court Abused its Discretion by Allowing Mekonen a Personal Recovery

Plaintiffs assert that Respondents inaccurately "depict the court as initially blocking any claim for personal damages and then changing her mind . . .." *Appellants' Response* at 29. It is Plaintiffs who are mistaken about the content of the record on this point.

As the deposition excerpts quoted in our Opening Brief demonstrate, Mr. Mekonen stonewalled production of documentary evidence of losses, and repeatedly denied that he sought to recover any money ("I haven't ask any money"), but he did testify (without documentary support) that his group as a whole lost a business opportunity valued at $189,000. *Brief of Respondents* at 42-45. As a consequence, on Defendants' Motion in Limine, the trial court ruled:

> I'm going to limit Mr. Mekonen's testimony to what was divulged in the deposition because he was specifically asked, "What are you seeking?"
>
> To the extent he can say, "We are seeking $189,000 in lost revenue." I'll permit that testimony. The defense had an opportunity to ask him that question.
>
> **But for him to now say, "I personally am out of pocket a certain amount of money, " I think it's unfair to allow you to present that testimony when he was specifically asked those questions in his deposition.** And he basically did not disclose what he would be seeking here at trial. That's the purpose of asking those questions in his deposition.

7/19 VRP 70-71/22-8 (emphasis added). Unfortunately, the trial court did not adhere to this ruling. When Attorney Gormley objected based on this ruling as soon as Mr. Mekonen was asked about the value of his "individual claim", the objection was overruled. 7/24 VRP 43/1-21. Thus, the trial court ruled one way in limine and then ruled exactly the opposite way before the jury without any explanation whatsoever. While the trial court is within its discretion to change its mind in a reasoned way,

it cannot simply by fiat declare one ruling one day and then the exact opposite on the same issue the next day. That is totally arbitrary, and therefore a textbook abuse of discretion.

Despite stonewalling discovery on his personal claim, Mr. Mekonen was allowed to present a personal claim for damages, and he was obviously awarded the most significant recovery ($133,000) of any party to this lawsuit, in the form of a personal judgment in his favor. CP 471-72. The limitation that the trial court initially placed on Mr. Mekonen's testimony proved meaningless, and in effect **no sanction at all was imposed.** That rewarded discovery abuse in defiance of *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 342, 858 P.2d 1054 (1993), and was therefore an abuse of discretion warranting reversal.

C. Mekonen had No Standing to Enforce the RFP Contract

As a separate and independent basis for reversal of the breach of contract award in favor of Mr. Mekonen, Defendants argue that he has no standing to enforce the RFP contract between Green Cab LLC and King County, and therefore the trial court erred in submitting instructions on breach of contract based on that contract. *Brief of Respondents* at 46-50. When Defendants raised this objection to the proposed instructions, trial counsel for Plaintiffs had no idea of a possible response until the trial

court helpfully suggested to him the theory that there was an oral agreement between the LLC members to comply with the RFP contract, which was separately enforceable. 7/31 VRP 1-2. By this time the trial was over, and there was no evidence of any separately enforceable contract between the original LLC members that would differentiate this case from any case in which persons draw together to carry out a common business enterprise in a corporate or LLC form.

If the oral agreement theory prevails, then all individual shareholders and LLC members become liable to one another on essentially corporate obligations, simply by virtue of joining in the enterprise. The fiction of an oral agreement to carry out the terms of Green Cab LLC entity contracts is nowhere supported by the record, and it proves too much – it is a way to bootstrap every corporate obligation into an obligation between the individual members, thus eviscerating both limited liability and the statutes (RCW 25.15.370-.385) and rules (CR 23.1) on derivative actions in a single stroke. As this lawsuit demonstrates, these parties are already potentially liable to one another under their Operating Agreement, and under the torts of tortious interference and breach of fiduciary duty. Plaintiffs have cited no precedent that would permit them also to usurp the entity rights under a contract demonstrably between the LLC and the County.

The oral agreement theory is also flawed because there can be no consideration for such an agreement. Consideration is a bargained-for exchange of performances, forbearances or promises. *Labriolla v. Pollard Group, Inc.,* 152 Wn.2d 828, 833, 100 P.3d 791 (2004). The members of an LLC are already bound together in a common enterprise for purposes of carrying out business with limited liability protection. They owe such duties of good faith as may be imposed by statute and common law, but nothing more. They have no personal interest in the fruits of LLC obligations – their only interest is as a member (or, for corporations, a shareholder) of the entity. Nor can they personally carry out the obligations of the LLC agreement beyond the actions taken by the LLC form, acting through its governing body. They lack the power to bestow the benefits or the burdens of the contract upon any individual. Their oral agreement to carry out a contract binding on the LLC adds no new obligation, because it is not theirs to carry out, except in their LLC capacity – which was already obligated by the original contract. An agreement to do what one is already obligated to do is no consideration. *Anderson v. County Properties, Inc.,* 14 Wn. App. 502, 505, 543 P.2d 653 (Div. 2 1975). What then is bargained for and given in exchange for personally committing themselves in some kind of oral contract to the performance of an LLC contract? It does not alter or increase anyone's

burdens under the contract. It does not alter or increase the benefits anyone will receive under the contract. The benefits and burdens of the LLC obligation are unchanged. Therefore, no consideration supports such an oral agreement.

Plaintiffs also argue that they were permitted to sue under the RFP because the Operating Agreement itself required that the Green Cab Board of Directors ensure "compliance with King County and other governmental rules, regulations and requirements applicable to the Company or its business." *Ex. 1* Article 6.1(c)(i). There are four key flaws with this argument. First, it is contrary to Plaintiffs' Group's leader's own testimony: Mr. Mekonen expressly and emphatically testified that the Operating Agreement ***does not*** obligate Green Cab management to operate the company in accordance with the King County RFP contract. 7/23 VRP 95/14-20, 96/1-5. Second, this provision is ill-suited to incorporate the RFP contract into the terms of the Operating Agreement, because a contract setting the terms for operating a cab company is not "governmental rules, regulations and requirements" – it is not governmental County action at all, but rather proprietary action pertaining to management of the County-owned taxicab licenses. *See, e.g., Branson v. Port of Seattle,* 152 Wn.2d 862, 870-71, 101 P.3d 67 (2004) (although running an airport is governmental, setting airport fees

and entering into contracts is proprietary). The cited Operating Agreement language refers more directly to compliance with rules and regulations that are generally applicable to all. *Okenson v. City of Seattle,* 159 Wn.2d 436, 447, 150 P.3d 556 (2007) ("[t]he principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity."). Third, even if this language could be stretched to incorporate the entire RFP contract into the Operating Agreement, the testimony of the Green Cab Board was unanimous that all steps they took, including modifications to the RFP contract obligations, were done with the permission and approval of King County. 7/30 VRP 109-10/25-2, 110/14-25, 113/7-14. Therefore, there is no evidence of breach of this provision of the operating agreement, and nothing to submit to the jury. Fourth and finally, the trial court instructed the jury based on breach of the RFP contract, not just the Operating Agreement provision cited above. 7/31 VRP 7/1-5, 9-10, 106.

III. CONCLUSION

The taxi business is tough enough without infighting within the company. It is time to end this dispute, and allow the Defendants' Group to move forward in the peaceful operation of Green Cab, free from a group who refuse to pay their fair share, yet interfere with all reasonable

management decisions. Defendants respectfully request that this Court: (1) affirm the injunctive relief including the order on buy-out; (2) reverse all judgments for breach of contract and tortious interference for failure to prove the essential element of damages; (3) reverse the personal judgment in favor of Shumet Mekonen based on his deposition testimony; and/or (4) reverse and remand the judgment for breach of contract in favor of Shumet Mekonen. In addition, Defendants request an award of their costs.

DATED this 4th day of September, 2013.

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CERTIFICATE OF SERVICE

I, Michael T. Schein, hereby certify that on the date set forth below I caused a copy of the within REPLY BRIEF OF RESPONDENTS IN SUPPORT OF CROSS-APPEAL to be sent by email to counsel of record for APPELLANTS and to trial counsel/co-counsel for RESPONDENTS, at the following addresses:

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